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RAZALI MOHAMED SAAD

v.

CIMB BANK BHD

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HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: 22NCC-61-01-2013]
27 JUNE 2013

C ***CONTRACT:*** *Breach - Damages - Quantum of damages - Mental anguish suffered by plaintiff as defendant bank's customer - Failure of defendant bank to remit periodical payments correctly - Exclusion clause - Whether defendant bank liable for error*

D ***DAMAGES:*** *Quantum - General damages for loss and damage - Mental anguish - Quantum of damages to be awarded - Whether defendant bank could rely on exclusion clause to deny liability*

TORT: *Negligence - Damages - Quantum of damages - Failure by defendant bank to remit periodical payments correctly - Whether defendant* E *bank liable for error*

The plaintiff was a customer of the defendant at all material times. The plaintiff contended that the defendant had erroneously failed to correctly remit periodical payments of RM1,200 due every F month under the plaintiff's housing loan account with HSBC Bank Berhad ('HSBC') and had inadvertently remitted the periodical payments from the plaintiff's account to a third party account for a period of six months which amounted to RM7,200. As a result of the mistakes by the defendant, the plaintiff's housing loan G was characterised as a defaulting loan and the subject property ('the house') in which the plaintiff resided, was put up for auction. Consequently, the plaintiff managed to resolve the matter with HSBC by paying directly for the instalments which had not been remitted correctly and the house was not sold. The plaintiff then H claimed for damages in the region of RM2,000,000 from the defendant for the loss and damage suffered, primarily for mental anguish as a result of the defendant's negligence and/or breach of contract. However, the defendant submitted that the terms of cl. 2 of the Periodical Payment Instruction Application Form I ('exclusion clause') absolves it from any liability, though it accepts that it was liable to make restitution of the sum of RM7,200. The issues that arose for determination were; *inter alia* (i) whether the

defendant could rely on the exclusion clause to absolve it from any and/or all liability for the error it made; and (ii) if the defendant was liable for such error and not entitled to rely on the exclusion clause, albeit in contract or in tort (negligence), what is the quantum of damages to be awarded to the plaintiff.

Held (allowing claim with costs):

(1) The full extent of the general exclusion clause was not made known to the plaintiff at the point in time when he contracted with the defendant. The defendant ought not to be allowed to rely on the exclusion clause as the defendant had in effect, breached its fundamental obligation of debiting and remitting periodical payments to the plaintiff as it had contracted to do. Hence, the exclusion clause did not negate or exclude the defendant's liability. (paras 27 & 28)

(2) The basis of the claim was for non-pecuniary loss. The primary loss or damage suffered by the plaintiff was the mental anguish arising as a consequence of the house being put up for auction. It was also exacerbated by the fact that the defendant took no action to rectify the same despite complaint. Accordingly, the award should commensurate with the degree of mental distress suffered. On the other hand, despite the fact that the house was put up for auction, it was not sold. Thus, the appropriate sum to be awarded to the plaintiff would be RM50,000 by way of general damages and RM7,200 by way of special damages. (paras 31, 33 & 44)

(3) The case-law relating to this area of law discloses that the courts are reticent in awarding large sums of monies by way of compensation. In fact, a modest approach ought to be adopted in determining the quantum of damages for such loss (*Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd*; refd, *Farley v. Skinner*; refd). (para 43)

Case(s) referred to:

Chan Whye & Sons Contractors v. Sarawak Shell Bhd [2012] 1 LNS 1179 HC ***(dist)***

Farley v. Skinner [2001] 4 All ER 801 ***(refd)***

Isito Electronics Sdn Bhd v. Teh Ah Kiam & Anor [2004] 3 CLJ 272 HC ***(refd)***

Krishnasamy Supramany v. Arab-Malaysian Finance Bhd [2009] 2 CLJ 853 HC ***(refd)***

ML Breadworks Sdn Bhd v. Malayan Banking Bhd [2013] 1 CLJ 833 HC ***(foll)***

A *Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd [2002] 1 CLJ 230 HC* ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:
B Rules of Court 2012, O. 14A, O. 22B r. 9(2)(b)

For the plaintiff - AJ Surin; M/s Wan Farid & Surin
For the defendant - Sean Yeo (JS Hoi with him); M/s Lee Hishammuddin Allen & Gledhill

C *Reported by Shah Saharudin*

JUDGMENT

D **Nallini Pathmanathan J:**

Introduction

[1] In this suit, the plaintiff, who was at all material times a
E customer of the defendant, CIMB Bank Berhad, seeks to recover damages in the region of RM2,000,000 (two million) from the defendant. The basis for the plaintiff's claim is that the defendant erroneously failed to correctly remit several monthly periodical payments due under the plaintiff's housing loan account with
F HSBC Bank Malaysia Berhad. The defendant instead erroneously and inadvertently remitted the periodical payments which it had correctly debited from the plaintiff's account to a third party account.

[2] As a consequence of these mistakes the plaintiff's housing
G loan was characterised as a defaulting loan and the subject property, namely the house in which the plaintiff resided, was put up for auction as a consequence of foreclosure proceedings initiated by HSBC Bank Malaysia Berhad.

H **[3]** The plaintiff sought to rectify this matter with the defendant but no steps were taken by the defendant to do so at that juncture.

[4] After the house had been put up for auction, the plaintiff
I managed to resolve the matter with HSBC Bank Malaysia Berhad by paying directly for the instalments which had not been remitted correctly by the defendant. As a consequence, the house was not sold.

[5] However the plaintiff makes claim for the loss and damage he suffered, primarily mental anguish and concern, as a consequence of the defendant's negligence and/or breach of contract in failing to remit the monies debited from his account correctly.

[6] The defendant does not dispute that the error above arose. Accordingly the issue of liability *per se* is not in issue. What remains in issue is as follows:

(i) Whether the defendant is entitled to rely on an exclusion clause in its contract to preclude liability for the said error; and

(ii) If the defendant is not entitled to rely on the said exclusion clause, then what is the quantum of damages that ought to be awarded to the plaintiff.

Case Management And O. 14A

[7] During the course of case management, the parties agreed as the facts were not in dispute, this would be a fit matter for disposal by way of O. 14A of the Rules of Court 2012 ('the ROC'), as the issue of the ambit and efficacy of the exclusion clause, and the quantum of damages payable are essentially matters of law.

[8] To this end the parties jointly agreed on the facts, issues to be determined and recorded this by way of consent in the court file. It was agreed that no oral evidence was necessary. However on the day scheduled for trial, learned counsel for the plaintiff altered his stance and maintained that the plaintiff wanted to give evidence in relation to this matter. Notwithstanding that this was directly contradictory to the stance adopted earlier, the plaintiff was directed to proceed to call the plaintiff as a witness. However the plaintiff was not present in court. Learned counsel then went on to explain that the plaintiff was physically in Kedah and could not be present that day.

[9] It must be said that such conduct on the part of counsel was calculated to cause delay and disrupt the court's schedule as the entire day had been set aside for the case. To insist on proving his case by calling oral evidence and yet making no provision for the primary witness, namely the plaintiff (who as a party ought to have been present in court) shows scant respect for the court and the proceedings. In the interests of justice

however, the court was constrained to adjourn the matter to the following day to allow the plaintiff to be present. Such conduct of proceedings by counsel is strongly deplored, as it causes delay and expense to all the other parties. It reflects a lack of professional conduct.

[10] In any event the matter proceeded the following day with the plaintiff being the sole witness. The defendant elected not to call any evidence because it had already acceded on the issue of liability.

[11] Upon completion of the plaintiff's evidence therefore the plaintiff closed its case and the matter proceeded to be dealt with in relation to the issues of law set out above.

Salient Facts

[12] At all material times the plaintiff had a banking account with the defendant, CIMB Bank Berhad at its Shah Alam branch bearing account number 1237-0069402-52-8. The plaintiff is also the owner of a residence known as No. 3, Jalan 61/10 Taman Koperasi Polis Batu Caves, 68100 Kuala Lumpur ('the said house').

[13] In August 2005, the plaintiff instructed the defendant to make periodical payments of RM1,200 every month from his account with the defendant to the plaintiff's housing loan account which was held with HSBC Bank Malaysia Berhad. The HSBC account number is 202-174223-107. The defendant executed the plaintiff's instructions faithfully until August 2010.

[14] In respect of the payment for the month of August 2010, the defendant deducted the sum of RM1,200 from the plaintiff's account but inadvertently credited the same to a third party's account with HSBC. Subsequently this error was replicated in the months of October 2010, November 2010, December 2010, January 2011 and March 2011. This amounts to a total of RM7,200.

[15] Despite complaints made by the plaintiff these errors were not rectified. As a consequence of these errors, there was a default in the repayment of the housing loan instalments due from the plaintiff to HSBC. Accordingly in February 2011 HSBC commenced foreclosure proceedings in respect of the said house. This was the subject matter of Civil Suit No: S-24NCVC-3-367-

2011. Notwithstanding that the cause papers relating to the foreclosure proceedings was served on the plaintiff, he did not attend court nor attempt to defend the same.

[16] Pursuant to the foreclosure proceedings thus initiated, a proclamation of sale was advertised in The Malay Mail stating the fact and date of the proposed auction. The said house was put up for auction (*vide* orders of court dated 21 April 2011 and 13 June 2011) on 23 August 2011 with a reserve price of RM180,000. Despite this the house was not sold. It is uncertain whether there were any bidders or whether the sale was aborted.

[17] Instead on 18 September 2012, almost a year later, the plaintiff repaid the arrears of monies due and owing under the housing loan to HSBC, in the sum of RM8,600. There is no receipt to this effect. However it is clear from the evidence produced in court and the cross-examination of learned counsel for the defendant that the last instalment of RM1,200 in the month of May 2011 was not paid out by the defendant by reason of insufficient funds in the plaintiff's account. As such it would appear that the erroneous crediting by the defendant is limited to six months, totalling RM7,200.

[18] As a consequence of the repayment of the said sum of RM8,600 according to the plaintiff the housing loan was regularised and brought the foreclosure proceedings to an end.

[19] In the instant suit the plaintiff seeks compensation for the loss and damage he claims to have suffered as a consequence of the erroneous crediting of monies from his account to a third party's account, rather than that of his account with HSBC for his housing loan, by the defendant. The plaintiff's suit is premised on breach of contract as well as negligence.

[20] The defendant in response to the plaintiff's claim, very candidly accepts that there was an error on its part in crediting the housing loan payments to a third party account in HSBC, rather than the defendant's housing loan account in HSBC.

[21] By way of defence however, the defendant however points to the terms of the 'periodical payment instruction application form' dated 26 August 2005 executed by the plaintiff in conjunction with his request for these monthly deductions. Clause 2 of the same provides that the bank accepts no responsibility, nor incurs any liability through any error or omission to make all or any of

A the payments it was directed to make. In other words the defendant maintains that this exclusion clause absolves it of any or all liability for the loss and damage suffered by the plaintiff. However the defendant accepts that it is liable to make restitution of the sum of RM7,200 which it erroneously credited to a third
B party account.

[22] Alternatively the defendant maintains that if there is liability, it is limited in quantum as borne out by case-law.

C **Issues**

[23] The parties agreed that the following issues arise for consideration:

(i) Whether the exclusion clause applies so as to absolve the
D defendant of any and/or all liability for the error it made?; and

(ii) If the defendant is liable for such error, *albeit* in contract or in tort (negligence), then what is the quantum of damages to be awarded.

E **The Defendant's Submissions On The Foregoing Issues**

[24] It is submitted for the defendant that the plaintiff has expressly agreed that the defendant shall not be liable if the periodical payments were not made. In this context, the defendant
F relies on cl. 2 of the terms and conditions of the application for periodical payment signed by the plaintiff which provides as follows:

> Although the Bank will endeavour to effect such periodical payments, it accepts no responsibility to make the same and
G accordingly, the Bank shall not incur any liability through an error, refusal or omission to make all or any of the payment or by reason of late payment or by any omission to follow any such instruction.

H **[25]** The defendant further submits that as the provision is clear and unambiguous it ought to be given its full effect (see *Isito Electronics Sdn Bhd v. Teh Ah Kiam & Anor* [2004] 3 CLJ 272; [2004] 7 MLJ 513, 522).

I **[26]** However I have had occasion to consider the effect of general exclusion clauses such as the above in *ML Breadworks Sdn Bhd v. Malayan Banking Bhd* [2013] 1 CLJ 833; [2012] MLJU 962. In that case the effect of a general indemnity clause such as

in the present case was relied upon to seek to absolve the bank there of all liability. I adopt the reasoning I utilised there in the instant case:

> ... In like manner, clause 6.4 seeks to limit the Defendant's total liability under the terms and conditions to nothing more than RM500-00 for all claims. In relation to the applicability of these clauses so as to exclude or limit the Defendant's liability, the reasoning in *Tai Hing Ltd. v. Liu Chong Hing Bank* (above) is instructive. In that case the limitation or exclusion clauses took the form of clauses to the effect that in the absence of confirmation from the client within a specified period after issuance of a bank statement, that statement would be taken as conclusive. This would mean that for forged cheques, if not detected within a specific period after issuance of the bank statement would amount to conclusive evidence of the validity of the transaction notwithstanding that a forgery had occurred. Given the existence of such clauses in the contract between the customer and the bank the Privy Council held as follows:
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> > ... Their Lordships agree with the views of the trial judge and Hunter J. as to the interpretation of these terms of business. They are contractual in effect but in no case do they constitute what has come to be called "conclusive evidence clauses". Their terms are not such as to bring home to the customer either "the intended importance of the inspection he is being expressly or impliedly invited to make," or that they are intended to have conclusive effect against him if he raises no query, or faith to raise a query in time upon his bank statements. If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the *Macmillan Greenwood* duties. Clear and unambiguous provision is needed if the banks are to introduce in the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

A In like manner with regards to the instant clauses referred to above the rationale is that if it was the intention of the Defendant that the Plaintiff would be deprived of rights which it would enjoy if not excluded by express agreement, then the burden of the objection and of the sanction imposed ought to be brought home to the Defendant. In other words can it be said that it was brought home to the Plaintiff when it entered into the relationship of banker and customer that it agreed at that point expressly to take precautions in the general course of carrying on its business to prevent forgeries on the part of its employees? And that it would forego its right to make claim against the bank for erroneously honouring forged cheques? Put another way, was it made clear to the Plaintiff that in the event of an unauthorised debiting of the Plaintiff's account arising from forgery or an unauthorised signature, the existence of clauses 2.7, 6.1 and 6.3 would have the effect of excluding the Defendant bank's liability for breaching its fundamental obligation of debiting the account only when a mandate is validly given? There is no evidence before this Court to suggest that this was indeed the case. For that reason I am not convinced that the provisions in clauses 2.7, 6.1 and 6.3 *albeit* singly or collectively, can have the effect of excluding or limiting liability to the extent contended by the Defendant (see also *Chairman, Sarawak Housing Developers' Association v. Malayan Banking Bhd* [2010] 10 CLJ 56).

[27] Applying the foregoing rationale to the present case it follows that the full extent of the general exclusion clause was not made known to the plaintiff at the point in time when he contracted with the defendant.

[28] There is no evidence before this court to that effect. Accordingly it follows that the defendant ought not to be allowed to rely on the exclusion clause as the defendant in effect breached its fundamental obligation of debiting and remitting periodical payments to the plaintiff as it had contracted to do. I am therefore satisfied that the exclusion clause here does not negate or exclude the defendant's liability.

[29] As such it follows that it is now incumbent upon this court to assess the requisite quantum of damages that are payable to the plaintiff for the loss and damage suffered as a consequence of the defendant's error.

Quantum Of Damages Payable

[30] On the issue of special damages there is no dispute. The defendant is prepared to make restitution in the sum of RM7,200 which is the total sum it paid out incorrectly to a third party. There is no dispute that this is the sum due and owing as special damages because the plaintiff himself had to concede that the payment due for May 2011 was not made because of insufficient funds in his account. Therefore the plaintiff's claim for special damages in the sum of RM8,600 has to be reduced to RM7,200.

[31] Learned counsel for the defendant submits that general damages is the correct remedy to be sought rather than punitive damages. In this respect the basis for the claim here is basically for non-pecuniary loss. It is essentially for the mental distress that the plaintiff suffered in having the said house put up for auction. On principle, general damages are meant to compensate, as far as money can, for the mental distress. The plaintiff is not meant to profit from the same (see *Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd* [2002] 1 CLJ 230 at pp. 244-245; see also *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777). Essentially these cases make the point that the function of the court where there is a breach of contract is not to put the plaintiff in a better financial position than if the contract had been properly performed.

[32] And in *Farley v. Skinner* [2001] 4 All ER 801 the facts were that the claimant who sought to purchase a tranquil country property instructed a surveyor to report on aircraft noise. The surveyor negligently reported that the property was unlikely to be affected by aircraft noise. The claimant purchased the property and subsequently discovered that it was significantly affected by such noise. A claim was brought against the surveyor for non-pecuniary damages. In discussion the principles of assessing damages in cases involving the grant of such non-pecuniary damages, Lord Steyn at p. 813 summarised the position thus:

> ... In the surveyor's written case it was submitted that the award of 10,000 pounds was excessive. It was certainly high. Given that the plaintiff is stuck indefinitely with a position which he sought to avoid by the terms of his contract with the surveyor I am not prepared to interfere with the judge's evaluation on the special facts of the case. *On the other hand, I have to say that the size of the award appears to be at the very top end of what could possibly be regarded as appropriate damages. Like Bingham LJ in Watts v. Morrow*

A *[1991] 4 All ER 937 at 960, [1991] 1 WLR 1421 at 1445 I consider that awards in this area should be restrained and modest. It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation.* (emphasis added).

B **[33]** In Malaysia the position is similar. In the unreported decision of *Badrul Zaman PS Mohamad v. Government of Malaysia* the Court of Appeal awarded a sum of RM300,000 for three years of wrongful detention under the then Internal Security Act 1960. The Court of Appeal set aside the award by the High Court of C RM3.3 million. Given the gravity of the issue before the court in that case, where the plaintiff was deprived of his liberty by the wrongful detention, the current case is far less serious. If a comparison is permissible, it amounts to a fraction of the mental distress suffered by that plaintiff. Accordingly the award here D should be commensurate with the degree of mental distress suffered (see *Krishnasamy Supramany v. Arab-Malaysian Finance Bhd* [2009] 2 CLJ 853).

Plaintiff's Submissions On Quantum

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[34] At the outset of his submissions, learned counsel for the plaintiff sought an amendment to the prayers in the statement of claim with regards to the fact that there should be an amendment to prayer (g) to substitute the word 'punitive' with 'am' meaning F that the amendments seeks to delete the claim for punitive damages and substitutes it with a claim for 'general damages'. Learned counsel for the defendant had no objection and the amendment was accordingly allowed.

[35] Substantively on the issue of quantum, learned counsel for G the plaintiff contends that the plaintiff is entitled to compensation in the sum of RM500,000 to RM2 million on the grounds that there was mental distress suffered by the plaintiff and oppressive conduct on the part of the defendant which was calculated to result in profit to the defendant at the expense of the plaintiff. However it H is to be noted that no evidence was proffered to substantiate the contention that the defendant behaved oppressively and in manner calculated to result in profit. No evidence was shown that the defendant profited by the mistake it made in failing to remit monies it had correctly debited to the plaintiff's housing loan account I with HSBC Banking Berhad.

[36] With respect to general damages, learned counsel submits that there should be general damages for the mental distress that the plaintiff suffered by reason of the defendant's error. Additionally counsel submits that the situation was exacerbated by the silence of the defendant.

[37] Learned counsel for the plaintiff has no argument against the case-law cited by the defendant in respect of the legal principles to be adopted by the court in determining the quantum of general damages payable. Counsel seeks the sum of RM500,000 by way of general damages for the loss suffered by the plaintiff. No case-law was produced to substantiate this submission.

[38] Counsel also relies on the case of *Chan Whye & Sons Contractors v. Sarawak Shell Bhd* [2012] 1 LNS 1179; [2012] MLJU 975 in relation to the award of damages. However a perusal of the case shows that it relates to exemplary damages which is not relevant here.

[39] The plaintiff however insists that he is entitled to exemplary damages. However it has not been prayed for in the statement of claim. It cannot now at the completion of trial be sought by way of an afterthought. In any event it is the finding of the court that there is no evidential basis for any such claim of exemplary damages.

[40] Apart from merely alleging so in the statement of claim and a bare statement in the witness box, no evidence whatsoever was produced to establish the basis for such a claim. As such the plaintiff's claim for exemplary damages is disallowed.

[41] Finally it is contended for the plaintiff that in assessing the appropriate quantum of general damages to be awarded, the court ought to take into account the fact that the bank failed to correct its initial error, despite the plaintiff's complaint. This to the court's mind is a relevant factor.

Judgment On Quantum Of Damages

[42] I have taken into consideration the facts of the instant case, as well as the case-law and submissions of learned counsel. It is clear in the instant case that the primary loss or damage suffered by the plaintiff was the mental anguish arising as a consequence of the fact that his house was put up for auction. It was exacerbated by the fact that the defendant bank took no action to rectify the same despite complaint. On the other hand, it would

also appear that despite the fact that the house was put up for auction, it was not sold. The plaintiff continued to live in the said house throughout the period and does so to date. In fact the plaintiff finally resolved the issue of monies owing to HSBC Banking Berhad almost one year after the house was put up for auction.

[43] The case-law relating to this area of the law discloses that the courts are reticent about awarding large sums of monies by way of compensation. As stated in the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 and *Farley v. Skinner* [2001] 4 All ER 801 a modest approach ought to be adopted in determining the quantum of damages payable for such loss.

[44] The recent Malaysian case-law also supports the foregoing stance. As such, given the entirety of the circumstances I am of the view that the appropriate sum to be awarded to the plaintiff by way of general damages is RM50,000 together with a sum of RM7,200 by way of special damages. There is no award for punitive or exemplary damages as the same was not prayed for. More significantly there was no evidential basis to warrant the grant of damages on such a measure or basis.

[45] With respect to costs, it is not in issue that the defendant has made an offer of settlement to the plaintiff prior to the trial of this action, in a sum in excess of that currently awarded. If the plaintiff had accepted the offer, this trial would have been obviated. The relevant provision is O. 22B r. 9(2)(b) of the ROC. Applying the same, the defendant seeks costs of RM10,000 as the offer was made on 28 May 2013 and considerable work was done from that date until today. In response the plaintiff seeks costs of RM9,000 for work done from the date of the filing of this suit until 28 May 2013. Having balanced the competing claims the court grants the defendant costs of RM3,000.